IN THE

Supreme Court of the United States

October Term 1940
No. 785.

WENZEL & HENOCH CONSTRUCTION COMPANY,
a corporation,

Petitioner,

vs.

THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, a municipal corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

JAMES H. HOWARD,
General Counsel,
CHARLES C. CARSON,
306 West Third Street, Los Angeles,
JAMES S. BOOTHE,
837 Van Nuys Building, Los Angeles,
Attorneys for Respondent.

Parker & Stone Company, Law Printers, Los Angeles.

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Respondent, The Metropolitan Water District of Southern California, answering the petition for writ of certiorari on file herein, respectfully represents as follows:

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals for the Ninth Circuit [R. 1328-1349] was written by Circuit Judge Denman, concurred in by Circuit Judges Mathews and Stephens, and is reported in 115 Fed. (2d) 25. The opinion of District Judge Yankwich [R. 391-403] is unreported.

JURISDICTION.

The jurisdiction of this court is invoked under Sec. 240(a) of the Judicial Code, as amended by the act of February 13, 1925, c. 229 (43 Stat. 938) (28 U. S. C. A., Sec. 347).

The opinion and judgment of the Circuit Court of Appeals herein were filed October 15, 1940 [R. 1349-1350]. Petition for rehearing was filed November 14, 1940, and was denied November 27, 1940 [R. 1350]. Petition for writ of certiorari was filed in this court on February 24, 1941, and service of notice thereof, together with printed copy of the record and printed copy of petition and brief of petitioner, was made on respondent March 1, 1941.

SUMMARY OF RESPONDENT'S OBJECTIONS TO THE PETITION.

Petitioner bases its application for writ of certiorari herein upon two basic grounds. The first, and apparently the major, ground is that the Circuit Court of Appeals failed to correctly apply the local law with respect to contracts, the performance of which is found to be impossible or so excessively difficult or expensive as to be impracticable and, hence, impossible, as the word is used in contract law.

As to this ground, in the various phases in which it is discussed, respondent's first objection is that there is no foundation in the record for the petitioner's position. The point was not developed in the courts below, in the

pleadings, the evidence, the findings, the appeal of petitioner, or the opinion of the Circuit Court of Appeals. Furthermore, no rescission or other attempt to terminate or reform the contract because of such claimed impossibility or impracticability of performance appears in the record.

References appear in the evidence, and elsewhere, to unanticipated difficulties encountered in prosecuting the work, but always in relation to the alleged erroneous and fraudulent character of the opinion and order of respondent's Chief Engineer determining that petitioner had unnecessarily and unreasonably delayed the performance of the work. Petitioner consistently took the position that, were it not for prevention of performance by respondent, it could have finished the work within the contract time, despite unanticipated difficulties.

The second basic ground relied on in the petition is that the Circuit Court of Appeals failed to correctly apply the local law in the matter of recovery in *quantum meruit* following an alleged breach of contract on the part of respondent in failing to make a certain progress payment.

It is asserted that, upon such breach, petitioner had a right to recover in *quantum meruit*. But the record shows that the breach did not constitute a prevention of performance; that petitioner elected to stand on the contract; that there was no timely, or other, abandonment or rescission; and that the Circuit Court of Appeals correctly applied the local law in holding that under such circumstances the election to rescind could not be made at the time of trial, and recovery had in *quantum meruit*.

STATEMENT OF THE CASE.

For the purpose of the present inquiry, petitioner's statement of substantive facts, except as herein modified and amplified, is sufficiently accurate and complete, although, if the case were before this court on the merits, respondent would feel it necessary to correct certain additional inaccuracies and deficiencies in petitioner's statement.

Respondent desires to call the court's attention particularly to the following statement appearing on page 4 of the petition:

> " * * * The character of the ground and the amount of water encountered was completely different from that which had or could reasonably have been anticipated. The Company's complaint is not merely that the construction was more difficult or more expensive than was expected. *The Company contends that the condition of the ground and the flowage of water actually turned out to be so completely different from such conditions as they were understood to exist or could reasonably have been anticipated to exist by each of the contracting parties, that performance of the public works contract as it was originally understood by the parties was impracticable because of the extreme difficulty and excessive expense involved.* * * *." (Emphasis supplied.)

If this statement is intended to refer to petitioner's contention in the courts below, it is entirely unsupported by the record. Such contention is presented for the first time in support of the pending application for writ of certiorari.

In supplementing petitioner's statement of facts it is respondent's purpose: (1) to indicate the true character of the issues as tried and appealed and to show that the issue of impossibility or impracticability of performance was not raised in the courts below; and (2) to point out that petitioner did not at any time abandon or rescind the express contract and, hence, is without legal basis in the record for recovery on the common counts.

(a) The Pleadings.

The trial court sustained demurrers to, and granted motions to strike portions of, the original complaint, with leave to amend [R. 51-52]. Petitioner, instead of amending, filed its First Amended Complaint, omitting the matter stricken from the first complaint [R. 53-73]. Trial on the issue of liability was had on the First Amended Complaint, as amended during trial [R. 388-389, 407], and the references herein will be to that Amended Complaint, unless otherwise stated.

1. *First Count* [R. 53-71]. The first cause of action is on the Public Works Contract, and prays for damages because of the alleged breach thereof. It was alleged that the opinion and order of the Engineer, finding that unreasonable and unnecessary delay had occurred in petitioner's performance of the work, was grossly erroneous and fraudulent [R. 62], and that the assumption of possession by respondent pursuant to said order was unlawful and constituted a breach of contract amounting to prevention of performance.

Nowhere in the first count is it alleged that the work contracted for was impossible of performance or so difficult or expensive as to be impossible, as the word is used in contract law. No rescission or other termination of the contract for this, or any other reason, is alleged; nor did petitioner pray for any relief because of impossibility of performance.

The gravamen of the first cause of action is that the conduct of the respondent District (not the impossibility of performance) prevented completion of the contract work, and the prayer is for damages for such prevention, measured by what the petitioner claimed it would have earned as profits by complete performance under the contract.

The first cause assumes that, but for the alleged unlawful prevention by respondent, petitioner could have completed the work and would have done so.

2. *Second and Third Counts* [R. 71-73]. The second and third counts contain merely the ordinary allegations of the "common counts" and are based on *quantum meruit* and "money had and received," respectively. The fourth count of the original complaint was dropped in the First Amended Complaint.

It may be urged that the common counts would permit the introduction of evidence of impossibility of performance, the discovery of such impossibility being followed by timely abandonment or rescission, resulting in availability of the remedies in *quantum meruit* and for "money had and received." Petitioner, however, is committed to a different theory of recovery on the common counts.

Prior to the trial the parties entered into a stipulation reading, in part, as follows [R. 383]:

> "In order to enable the Court to pass upon the defenses pleaded in defendant's fourth answer to each count, or cause of action, of plaintiff's first amended complaint without the introduction of all of plaintiff's evidence in chief, it is hereby stipulated and agreed by and between the attorneys for the respective parties to the above entitled action, as follows:
>
> "1. It is stipulated that plaintiff's second cause of action in *quantum meruit* arises out of an alleged breach of a valid contract (describing the contract), *to-wit, the failure of said District to pay the December, 1934, estimate to the plaintiff,* * * *
>
> "2. It is further stipulated that plaintiff's third cause of action for money had and received arises out of the *same alleged breach* of said contract, * * *." (Emphasis supplied.)

Petitioner took the position that because respondent had breached the contract by failure to make a progress payment, petitioner could elect at the trial to rescind the special contract and recover on the common counts. No abandonment or rescission of this written contract was pleaded.

Thus, so far as the pleadings are concerned, the issue of impossibility of performance was not presented, nor was a legal basis laid for rescission of the express contract and recovery in *quasi*-contract. The first cause is pleaded on a theory inconsistent therewith, and the common counts are predicated upon the theory set out in the stipulation without postulating any abandonment or rescission of the formal contract.

(b) The Evidence.

1. *Impossibility of Performance.* Turning to the evidence, we find no suggestion of impossibility of performance. True, the difficulties encountered in the work were fully shown, but such difficulties were put forward as an excuse for delay and in an attack upon the validity of the opinion and order of respondent's Engineer finding such delay to have been unreasonable and unnecessary. On this issue the trial court found that the opinion of the respondent's Engineer was not erroneous or fraudulent [R. 415-416]. The Circuit Court of Appeals sustained the finding [R. 1336] (115 Fed. (2d) 28).

Directly contrary to petitioner's present contention that the work was impossible of performance, it is to be noted that petitioner's witnesses (one of them the Vice-President of petitioner company) stated that, despite delays due to the unanticipated difficulties, the petitioner, if permitted to remain in possession, "could have completed the contract within the time limit specified in the contract" [R. 604 (Seefeld), 621 (Peterson), 756-757 (Tinkler)].

2. *Absence of Rescission.* There was no evidence of abandonment, rescission or other termination of the contract, based on impossibility of performance, failure to make the progress payment, or any other ground, petitioner consistently affirming the contract and claiming a right to prosecute the work thereunder.

The evidence showed, without conflict, that the true conditions under which the work was to be done were discovered early in the course of work. Petitioner states, in its petition (page 4):

> "* * * The tunnel excavation was started in the early part of 1934 and *from the very beginning*

> conditions were encountered radically different from those anticipated in the Bidding Sheet, specifications, and in the extensive geological report furnished by the District." (Emphasis supplied.)

Again, on page 5, petitioner states:

> "* * * But *very soon* after excavation was started on the tunnel proper slushy ground and unprecedented flows of water developed." (Emphasis supplied.)

Petitioner, however, did not promptly, or at all, seek in any way to terminate or reform the contract. Until February 12, 1935, petitioner continued its inept attempt to perform, and on that day was removed from the work [R. 412]. At all times petitioner relied on the contract for its claimed right to possession of the site of the work.

On January 15, 1935, the opinion and order of respondent's Engineer, that the work had been and was unnecessarily and unreasonably delayed, was rendered and the order of suspension of work was issued and served upon petitioner [R. 413-414]. Petitioner refused to obey and continued in possession of the tunnel, claiming the right to do so under the contract [R. 418].

Respondent brought suit to enjoin such continued possession and to prevent interference with respondent's entry on the work [R. 418-419]. Petitioner, again relying on the contract, defended the cause, and the District Court, in the exercise of its discretion, denied respondent's application for injunction *pendente lite* [R. 419-420], leaving petitioner in possession. The action was dismissed on

February 11, 1935, on motion of respondent District (plaintiff therein) [R. 423].

Even after having been removed from the work on February 12, 1935, petitioner, relying on the contract, in a suit filed February 18, 1935, and described by the Circuit Court of Appeals as one for "specific performance" [R. 1346] (115 Fed. (2d) 32), sought to regain possession [R. 423]. Petitioner was unsuccessful, the suit being dismissed March 11, 1935, on motion of the respondent District [R. 424].

The trial court found:

> "That plaintiff continued to perform work in the construction of the said San Jacinto Tunnel after the receipt of said letter (Exhibit 'D') on January 9, 1935, until February 12, 1935, when defendant took possession of said Jacinto Tunnel and appurtenant works as herein found. That plaintiff did not at any time, or at all, rescind or terminate said contract for the construction of the said San Jacinto Tunnel and the appurtenant works of the Colorado River aqueduct, a copy of which contract is marked Exhibit 'A' and attached to the first amended complaint herein." [R. 412.]

The Circuit Court of Appeals said:

> "The Company (petitioner here) offered no proof at the trial that it had in fact rescinded the contract and, in the face of the record, the trial court's finding that no rescission occurred cannot be set aside." [R. 1346] (115 Fed. (2d) 32.)

(c) The Opinion of the Circuit Court of Appeals.

The theories upon which the case was tried and appealed are fully disclosed by the opinion of the Circuit Court of Appeals. All issues presented by petitioner are discussed and disposed of. The matter of impossibility of performance is not mentioned, because it was not presented [R. 1328-1349] (115 Fed. (2d) 25-33). The right of petitioner to recover on the common counts, in the absence of abandonment or rescission, is discussed (on the only ground presented to the court as the basis of such right) and is correctly decided.

It has been our purpose, in this partial review of the facts, to show that the issue of impossibility of performance was not present in the courts below, and that there was no abandonment, rescission, or other attempt to terminate the contract by reason of any such impossibility or because of respondent's failure to make the progress payment, or for any other reason, the petitioner at all times standing on the contract and seeking recovery for damages alleged to have resulted from the respondent's unlawful prevention of full performance thereof.

ARGUMENT.

I.

Petitioner's Statement of "Questions Involved" Does Not Warrant Issuance of the Writ.

The "Questions Involved" as stated on pages 9-10 of the petition, cannot now be raised by petitioner on the record at bar.

Question No. (1) (p. 9), is predicated upon the claimed "impossibility of performance," and asks whether the trial court, in the face of such "impossibility," was justified in holding that, as a matter of law, the company could not recover in *quantum meruit.*

No such question was presented to the trial court by the pleadings or the evidence. The theory of petitioner's *quantum meruit* count, as set out in the stipulation [R. 383] and as developed in the evidence and in argument, is predicated on quite a different basis, *i. e.,* that since respondent had breached its contract by refusing to make a progress payment, petitioner was entitled to treat the contract as at an end and to sue in *quantum meruit.* The Circuit Court of Appeals said [R. 1345] (115 Fed. (2d) 31):

> "There remains for consideration the Company's claim that the district court improperly denied it judgment on the second and third counts for recovery aside from the contract. In addition to the acts of the District in giving the notice of suspension and ejecting the Company from the works, the Company relies upon the act of the District of January 9, 1935, in withholding the December progress payment as supporting its suit in quantum meruit."

In making this observation, the Circuit Court of Appeals stated the only ground presented to it and to the District Court as the basis of recovery in *quantum meruit*. No question such as is now suggested was presented to either of the lower courts.

Question No. (2) (pp. 9-10), is closely related to question No. (1). It erroneously assumes that there was present in the case the issue of impossibility of performance, and asks whether, in view of the issue so assumed, it was not prejudicial error for the trial court (1) to strike that portion of the company's original complaint alleging that the parties entered into the contract relying upon information contained in a certain geological report, (2) to refuse to permit the amendment of the First Amended Complaint to restore such allegations, and (3) to refuse to admit the geological report in evidence.

The assumed issue was not in the case. There was no allegation or evidence of impossibility of performance (however defined). Petitioner had not sought in any way to terminate or reform the contract, but, on the contrary, with full knowledge of the actual underground conditions, had repeatedly affirmed it and relied thereon. The preliminary inducements to the contract were not involved.

Question No. (3) (p. 10), refers to "the relation between the unanticipated ground conditions and the time initially estimated for completion of the work," and asks whether, in the absence of entire abrogation of the contract, "was not the District's seizure of the work because of alleged delay combined with its previous refusal to pay the December progress payment a breach of contract."

The question has two phases. The first phase (as to the legality of the seizure of the work in view of unanticipated ground conditions), in reality, goes to the factual issue of the alleged erroneous and fraudulent character of the opinion and order of respondent's Engineer, finding unreasonable and unnecessary delay and suspending the work, upon which opinion and order respondent based its seizure of the tunnel. On this issue the evidence was full and complete and disclosed all of the conditions under which the work had been, in part, performed, including "unanticipated ground conditions." The finding in favor of respondent, *i. e.*, the finding that the opinion of respondent's Engineer was not erroneous or fraudulent [R. 415-416], was sustained by the Circuit Court of Appeals on the record [R. 1336] (115 Fed. (2d) 28). The facts being so determined, the seizure of the tunnel did not constitute a breach of contract.

The second phase of the question relates to respondent's refusal to pay a progress estimate and is entirely unrelated to the unanticipated ground conditions. The refusal to pay was predicated on the terms of the supplemental agreement [R. 409-411]. The Circuit Court of Appeals did not find it necessary to determine whether such refusal was a breach of the Public Works Contract [R. 1342] (115 Fed. (2d) 31). The refusal did not involve a prevention of performance and petitioner did not rescind, or otherwise terminate the contract, by reason thereof, but, at the time of respondent's seizure of the work, was still in possession and continuing its attempt to perform under the contract [R. 412, 418].

II.

Petitioner's "Reasons for Granting Writ of Certiorari" Are Untenable.

The first reason advanced (Petition, p. 10) for granting the writ is "Because the District Court and the Circuit Court of Appeals in disposing of this case have failed to apply, or reach a result consistent with, the local law of the State of California".

By reference to the brief (Part I, pp. 15-19), it becomes apparent that the "failure to apply local law" relates, in the main, to the erroneously assumed issue of impossibility of performance. There being no such issue in the case, the reason falls. (*Helvering v. Minnesota Tea Co.* (1935), 296 U. S. 378, 380, 80 L. Ed. 284, 286; *United States v. Atkinson* (1935), 297 U. S. 157, 158-159, 80 L. Ed. 555, 556; *Edward Hines Yellow Pine Trustees v. Martin* (1924), 268 U. S. 458, 464-465, 69 L. Ed. 1050, 1053-1054.)

Thus the cases cited by petitioner at page 15 of its brief, (*Mineral Park Land Co. v. Howard* (1915), 172 Cal. 289, 156 Pac. 458, L. R. A. 1916F 1; *Transbay Construction Co. v. City and County of San Francisco* (1940), 35 Fed. Supp. 433; *Christin v. Superior Court* (1937), 9 Cal. (2d) 526, 533, 71 Pac. (2d) 205, 208) in support of the contention that California recognizes impracticability of performance due to excessive and unreasonable difficulty and expense as legal impossibility, have no application to any issue in the case at bar. We do not disagree with such principle of contract law and neither did the District Court nor the Circuit Court of Appeals: The question was not presented or passed upon and there is no occasion to consider such proposition now raised by petitioner for the first time.

Petitioner, in support of its argument that "the actual conditions under which the tunnel construction had to be carried on were so radically different from the conditions believed by both parties to exist when the agreements were executed that the original agreement should be regarded as abrogated and a *quantum meruit* recovery allowed the company" and that "No formal rescission is necessary as a condition precedent" (brief, p. 19), cites *Transbay Construction Co. v. City and County of San Francisco, supra.* This decision was made by the United States District Court for the Northern District of California in issuing a nonappealable order of reference to a master, and we are informed that the trial before the master is now under way. The case cannot be said to have any finality. Petitioner quotes (brief, p. 18) a portion of the District Judge's opinion in which he concludes that a contractor, after completing a Public Works Contract let on competitive bidding, may sue in *quantum meruit* for work done as a result of unanticipated difficulty and expense. The District Judge, immediately following the excerpt quoted by petitioner, cites several cases but none of these cases is from California and the decision is contrary to the law of that state. (Compare *Thos. Kelly & Sons, Inc. v. City of Los Angeles* (1935), 6 Cal. App. (2d) 539, 45 Pac. (2d) 223.)

Part IV of the brief (p. 23), presents another claimed failure to apply local law. Even though we take as correct the statement therein made that "Under California law it is clear that such a refusal to pay installment pay-

ments is a sufficient breach of the agreement to put the District in default" (Petitioner's Brief, p. 23), it is also clear that timely rescission, or some act of abandonment susceptible of treatment as a rescission, must precede action in *quantum meruit,* based on work originally covered by special contract. Petitioner, having elected to stand on the contract until after seizure of the tunnel by respondent on February 12, 1935, pursuant to the Engineer's opinion and order of January 15, 1935, could not thereafter abandon and rescind the contract on the ground of respondent's failure on January 9, 1935, to make a progress payment, and then recover in *quantum meruit.* (*American-Hawaiian Engineering & Construction Co. v. Butler* (1913), 165 Cal. 497, 513, 133 Pac. 280, 286.)

There being no allegation or proof of rescission or abandonment or other termination of the contract, and the trial court having found that petitioner "did not at any time, or at all, rescind or terminate said contract" [R. 412], there was no failure to apply local law. The care with which the Circuit Court of Appeals considered and applied "the local law" as established by the California cases, including those cited by petitioner at page 23 of its brief (*S. F. Bridge Co. v. Dumbarton L. & I. Co.* (1897), 119 Cal. 272, 51 Pac. 335; *Bancroft v. Woodward* (1920), 183 Cal. 99, 190 Pac. 445), is exemplified in the following portion of that Court's opinion [R. 1345-46] (115 Fed. (2d) 32):

> "Although under the California rule in building contracts the failure to pay an installment when due is not such a breach as will support an action on the contract for full performance, it will support a rescis-

sion of the contract and recovery in *quantum meruit*. Cox v. McLaughlin, 54 Cal. 605, 608, 609, 619; Cox v. McLaughlin, 76 Cal. 60, 62, 63, 18 P. 100; Porter v. The Arrowhead Reservoir Co., 100 Cal. 500, 502, 503, 35 P. 146; San Francisco Bridge Co. v. Dumbarton Land & Improvement Co., 119 Cal. 272, 274, 51 P. 335; see Fairchild-Gilmore-Winton Co. v. Southern Ref. Co., 158 Cal. 264, 274, 110 P. 951, and Connel v. Higgins, 170 Cal. 541, 150 P. 769, 772; Monson v. Fischer, 118 Cal. App. 503, 519, 5 P. (2d) 628. Rescission of the contract in such case, however, must be within a reasonable time of the breach. Cal. Civil Code, Sec. 1691; Brown v. Domestic Utilities Mfg. Co., 172 Cal. 733, 736, 159 P. 163; Bancroft v. Woodward, 183 Cal. 99, 107, 108, 190 P. 445, Davis v. Rite-Lite Sales Co., 8 Cal. (2d) 675, 682, 67 P. (2d) 1039.

"Assuming that it was still reasonable for the Company to elect to rescind the contract because of the alleged breach of January 9, 1935, after the District had served its notice of suspension of work under the contract and had ousted the Company from the work, the fact remains that such an election was never made.

"On February 18, 1935, the Company brought a suit in equity for specific performance of the contract to require possession to be restored to the Company, in an attempt to regain possession of the tunnel so that it might continue the work. Following the dismissal of this suit upon motion of the District on March 11, 1935, the Company took no further action with respect to the contract until January 8, 1937, when the case at bar was filed. The first amended complaint, on which trial occurred, was filed May 24, 1937. By neither of these pleadings did the

> Company allege that it had abandoned the contract or had rescinded it. The Company offered no proof at the trial that it had in fact rescinded the contract and, in the face of the record, the trial court's finding that no rescission occurred cannot be set aside. Hollenbach v. Schnabel, 101 Cal. 312, 35 P. 872, 873; Cf. Palmer v. Fix, 104 Cal. App. 562, 567, 286 P. 498, (Hearing den. by Sup. Ct.)."

Reason No. (2) (Petition, p. 10; Brief, Part II, pp. 20-22) complains of a miscarriage of justice and the inequitable distribution of burdens of the cost of public work. The case is one at law. There was no issue presented in any way related to the "reason" thus urged. The cause was fairly tried and correctly decided. Review by this Court is not warranted by the "reason" assigned.

Reason No. (3) (Petition, pp. 10-11) directs attention to an asserted need for clarification of the law. Referring to petitioner's brief (Part III, p. 22), for amplification of this reason, we find that it relates to the law governing the rights of parties in instances in which contracts are impossible of performance and discusses "objective impossibility" as contrasted with such excessive difficulty and expense as to constitute impossibility in the eyes of the law. Inasmuch as the matter so discussed was not presented to the courts below and is not mentioned in the pleadings, evidence, findings, petitioner's appeal to, or the opinion of, the Circuit Court of Appeals, the need for clarification is not apparent.

Conclusion.

Neither the "Questions Involved" nor the "Reasons for Granting Writ of Certiorari" as set out in the petition on file herein, nor any issues available to petitioner on the record at bar, justify issuance of the writ prayed for.

Respondent respectfully urges that the petition be denied.

Respectfully submitted,

JAMES H. HOWARD,
General Counsel,
CHARLES C. COOPER, JR.,
JAMES S. BENNETT,
Attorneys for Respondent.